Filed 7/20/20 Michael v. Sabin CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

SIMON MICHAEL, Cross-complainant and Respondent, v. GAIL SABIN et al., Cross-defendants and Appellants.	A156137 (San Francisco County Super. Ct. No. CGC-15-547916) **ORDER MODIFYING OPINION AND DENYING REHEARING; NO CHANGE IN JUDGMENT**

BY THE COURT:

It is ordered that the opinion filed herein on June 29, 2020, be modified as follows:

The panel that heard oral argument in this matter on June 16, 2020, consisted of Presiding Justice J. Anthony Kline and Associate Justices James A. Richman and Therese M. Stewart.

Associate Justice Marla J. Miller did not participate in this matter in any way. Justice Miller's name was appended to the signature page of the opinion through clerical error caused by the unique challenges of the Covid-19 pandemic. All of the court's justices, attorneys, judicial assistants and clerks are working separately and from their homes. This type of error ordinarily would have been corrected before filing.

The court apologizes for the error and orders the opinion modified to reflect the correct panel of Presiding Justice Kline and Associate Justices Richman and Stewart as listed on the signature page attached hereto.

The petition for rehearing is denied. There is no change in judgment.

Dated:_____ _____

KLINE, P.J.

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.

Michael v. Sabin (A156137)

Filed 6/29/20 Michael v. Sabin CA1/2 (unmodified opinion)

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SIMON MICHAEL, Cross-complainant and Respondent, v. GAIL SABIN et al., Cross-defendants and Appellants.	A156137 (San Francisco County Super. Ct. No. CGC-15-547916)

This appeal stems from a feud between neighbors over a project involving the expansion of a San Francisco home. The primary contestants in what has become a drawn-out legal battle are Sidney and Nancy Unobskey,[1] on the one hand, and the defendant and cross-complainant Simon Michael on the other. Both the Unobskeys and Michael have sued each other *and* each other's contractors or consultants.

The pleading at issue in this appeal is Michael's cross-complaint against the Unobskeys, their architect Gary Millar, and their personal assistant Gail Sabin. The Unobskeys, Millar and Sabin responded to that

[1] Sidney Unobskey is the sole plaintiff in the original action while both Sidney Unobskey and Nancy Unobskey are named as cross-defendants in the cross-complaint at issue here.

cross-complaint by filing an anti-SLAPP motion, which for various reasons the trial court denied.[2] Millar and Sabin contend the trial court erred in denying the anti-SLAPP motion as to Michael's claims against them. The issues before us are whether Millar and Sabin have shown the cross-complaint against them is based on protected activity as defined in the anti-SLAPP statute, Code of Civil Procedure section 425.16, and, if so, whether Michael has demonstrated a probability of prevailing on his claims against them.[3] Exercising de novo review, we conclude the cross-complaint is based on protected activity under section 425.16, subdivision (e)(2) and that Michael has not shown a likelihood of prevailing on the merits of his cross-claims. We therefore reverse the order of the trial court and remand with instructions to dismiss the cross-complaint against Millar and Sabin.

BACKGROUND

I.

Facts and Allegations

Sidney and Nancy Unobskey and Simon Michael and his wife Margaret own homes on adjoining lots in a tony neighborhood in San Francisco.[4] Prior to purchasing his home in 2011, Michael and his family rented a part of that dwelling from the prior owner for almost 20 years. Although the Unobskeys and the Michael family were long-time neighbors, they became embroiled in an increasingly contentious dispute when, after purchasing his home, Michael commenced a major construction project involving excavation and

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[2] Millar and Sabin have appealed the trial court's decision. The Unobskeys initially joined them, but later dismissed their appeal.

[3] Except as specifically indicated otherwise, all further statutory references are to the Code of Civil Procedure.

[4] Both families' properties are owned by family trusts but for convenience we refer to them as the parties' homes.

remodeling that entailed digging piers on the property line adjacent to the Unobskeys' property.

Michael's project has required permits and other government approvals, to many of which the Unobskeys raised objections, made complaints or filed appeals with local government officials and tribunals. In about 2013, Unobskey[5] complained to the San Francisco Department of Building Inspection (DBI) that Michael had undertaken work outside the scope of a permit, and in 2014, he opposed and appealed the Planning Department's issuance of a variance to Michael. In January 2015, Unobskey agreed to withdraw his appeal of the variance decision and entered into a partial settlement agreement with Michael. The settlement agreement was limited, with neither party admitting any liability, and it specifically reserved the Unobskeys' right to claim Michael's construction work had damaged their property. Unobskey continued to register objections with local government authorities regarding Michael's project and continued to complain that his excavation work had caused settlement of the Unobskeys' property. Unobskey also contended Michael should be required to remove two balconies or decks at the rear of his property, which he contended were unpermitted and intruded on the Unobskeys' privacy. In August 2015, Unobskey appealed from a permit decision involving the third phase of Michael's project, unsuccessfully arguing about these same issues and contending that the work required environmental review.

Throughout the course of the administrative proceedings, Michael accused Unobskey of attempting to "extort" him by objecting to his project in

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[5] The cross-complaint makes different allegations as to Sidney and Nancy Unobskey. We will refer to Sidney as Unobskey and to Sidney and Nancy Unobskey together as the Unobskeys.

an effort to get him to agree in advance not to object to a planned expansion by the Unobskeys of their own home. He disagreed strenuously with their argument that his excavation work had caused any significant settling of their property and accused them of trying to cover up the fact that they had experienced substantial settlement long prior to when Michael began his excavation work. At some of the administrative hearings, the Unobskeys spoke on their own behalf, at others they were represented by counsel, and on one or more occasions Millar spoke on their behalf.

In September 2015, Unobskey filed the complaint in this action against Michael and three of his contractors, asserting they violated Civil Code section 832, which governs landowners' responsibilities to adjoining owners when making improvements that involve excavation. Unobskey's complaint also asserted causes of action for negligence, nuisance, trespass, breach of the settlement agreement and the covenant of good faith and fair dealing, and declaratory relief. The thrust of that complaint is that Michael's excavation work deprived the Unobskeys' property "of lateral and subadjacent support" resulting in past and continuing subsidence of the soil under the property and settlement of the structural improvements on it.

In June 2016, Michael filed a cross-complaint against the Unobskeys, and in July 2018 (with permission of the court), filed a first amended cross-complaint adding Millar and Sabin as cross-defendants. The first amended cross-complaint, which we will simply refer to as the "cross-complaint," is the subject of this appeal. The primary targets of the cross-complaint were the Unobskeys. As he did in the administrative proceedings, Michael alleged in the cross-complaint that Unobskey attempted to "extort" him by threatening to "challenge every aspect of Michael's project and make every effort to delay or prevent it" unless Michael agreed to allow the Unobskeys to undertake a

major expansion of their own home that would block windows and balconies on Michael's property and "compromise Michael's privacy." The cross-complaint alleged that after Michael declined to sign Unobskey's proposed expansion agreement, (1) Unobskey reported Michael to the DBI, claiming he had done work that was outside of the scope of his building permit, (2) in an effort to cover up Unobskey's extortionate demands, Nancy Unobskey falsely testified at the hearing on Michael's request for a variance that her family had " '[n]o plans to expand the building, our home, at all at this time,' " (3) the Unobskeys' appeal from the variance raised issues that were "trivial," "contrived" and "unrelated to the variances" sought, had "no substantive basis" and was an effort "to extort concessions from Michael," Unobskey engaged in various frauds and "bullying tactics" in connection with the appeal, and the Unobskeys' conduct in connection with the appeal "delayed [Michael's] construction by well over 6 months." Michael also alleged the Unobskeys installed a new and improperly constructed foundation during remodeling of their home in the 1990s, there are underground streams beneath the Unobskeys' home, and the streams and defective foundation caused settlement damage to their home that long pre-existed Michael's excavation work.

Finally, and most significantly for purposes of this appeal, Michael alleged that Unobskey, with the participation of his architect Millar, falsely claimed Michael's "pier work had caused a large amount of settlement damage" to the Unobskeys' home and demanded a repair that would cost $700,000 to $900,000, when the settlement of the Unobskeys' home after Michael's construction began was de minimis and the settlement problem affecting the Unobskeys' home was longstanding and the product of the Unobskeys' own earlier defective foundation work. Unobskey's efforts "to

blame Michael's construction for current and future settlement of [Unobskey's] property" allegedly included "go[ing] to other neighbors and alarm[ing] them by claiming that Michael's construction [work] threaten[ed] their foundations."

The particular allegations as to Millar were that he "acted as 'point man' for [Unobskey] and assisted [him] in harassing the Michael project in numerous ways." Michael alleged Millar "purposefully misled Michael and his consultants into believing that Michael's construction had caused 'new distress' at [the Unobskeys'] house," when he knew the " 'new distress' at [their] house existed prior to Michael starting construction because there were pre-construction photos showing the same 'distress.' " He also alleged Millar "purposely withheld information from [Unobskey's] consultants, Luis Moura and Alex Rood, relating to this 'new distress' so that Mr. Moura and Mr. Rood would prepare reports blaming the 'new distress' on Michael's construction. The false reports would then be used to support [the Unobskeys'] appeals of Michael's permits." Millar also allegedly assisted Unobskey in withholding damaging documents, including a report from another expert opining that "any negative impact on your building should be minimal to negligible." The fraud cause of action also included allegations that Millar misrepresented to Michael that the balconies on his property were not legally permitted. This was false, Millar alleged, because "[t]here was a legal permit on file for one of the balconies, and strong evidence that in fact both balconies were legally permitted," and "Michael's balconies were, in fact, legal and had existed for a significantly long time."

As to Sabin, Michael alleged she was Unobskey's "personal assistant" who also knew of the prior settlement and "denied that [Unobskey] ever raised issues about settlement of his home to her." Sabin made false

statements "in an attempt to assist [Unobskey] in extorting and defrauding Michael." Had she instead "admit[ted] the obvious, that under [Unobskey's] direction she sought to make an insurance claim for settlement damage prior to 2012, it would be obvious that [Unobskey's] claims against Michael in 2013 and on were a fraudulent attempt by [Unobskey] to force Michael to assume liability for a pre-existing condition."[6]

Based on these allegations, Michael's cross-complaint asserted claims against Millar and Sabin for fraud and conspiracy with the Unobskeys to "take certain actions against Michael that would affect Michael's use and enjoyment of his Property" and to "help Sidney and Nancy extort money from Michael." Michael alleged the Unobskeys, Millar and Sabin made the statements knowing them "to be false" and "with the intention to induce Michael and the Planning Department to act in reliance on [them]." Their "pattern of deceitful and fraudulent behavior designed to extort concessions from Michael" allegedly "cost Michael approximately $350,000 in consultant fees as Michael were [*sic*] forced to rebut the fraudulent claims" and further "kept Michael and his family from being able to use their home, increased the costs and carrying costs of construction and forced Michael to pay rent," costing them an additional $600,000. The alleged conspiracy to defraud him,

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[6] The cross-complaint also alleged Sabin "intentionally destroyed [the Unobskeys'] documents" pertaining to prior settlement and "intentionally had Strokes Painting cover the large crack in the basement, so that Michael and the other defendants could not inspect the alleged damage to the [Unobskeys'] foundation." Further, there were allegations about an incident in which Sabin allegedly rolled a marble across the floor to demonstrate that there had been settlement of the Unobskeys' house and attributed that settlement to Michael's work. Michael now disclaims any reliance on these incidents as a basis for his claims against Sabin, asserting they are simply "circumstantial evidence that there was an agreement between the Unobskeys and Sabin to harm Michael (i.e. conspiracy)."

in which Millar and Sabin participated with the Unobskeys, Michael alleged, caused him unspecified "injury and damages in an amount in excess of $7,000,000."

II.

The Anti-SLAPP Motion

All four cross-defendants, the Unobskeys, Millar and Sabin, jointly filed a special motion to strike the cross-complaint under the anti-SLAPP statute, section 425.16, asserting the cross-complaint against them was based on protected activity and that Michael could not prevail on his claims against them. Michael opposed the motion, claiming each of the causes of action against all defendants either was not protected activity or was meritorious. The trial court denied the motion on the ground, as to most of the claims, including those against Millar and Sabin, that the cross-defendants had not shown the claims were based on protected activity. The court did not address whether Michael had shown he was likely to prevail on those claims.

DISCUSSION

I.

Anti-SLAPP Law and the Standard of Review

We have set forth the basic principles governing anti-SLAPP motions on many occasions. (*Richmond Compassionate Care Collective v. 7 Stars Holistic Foundation, Inc.* (2019) 32 Cal.App.5th 458, 466; see *Industrial Waste & Debris Box Service, Inc. v. Murphy* (2016) 4 Cal.App.5th 1135, 1146-1148.)

" 'Subdivision (b)(1) of section 425.16 provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the

plaintiff has established that there is a probability that the plaintiff will prevail on the claim." Subdivision (e) of section 425.16 elaborates the four types of acts within the ambit of a SLAPP, including, . . . "[(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or] (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

" 'A two-step process is used for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity, that is, by demonstrating that the facts underlying the plaintiff's complaint fit one of the categories spelled out in section 425.16, subdivision (e). If the court finds that such a showing has been made, it must then determine the second step, whether the plaintiff has demonstrated a probability of prevailing on the claim.' " (*Richmond Compassionate Use v. 7 Stars Holistic Foundation, Inc., supra,* 32 Cal.App.5th at pp. 466-467, quoting *Hecimovich v. Encinal School Parent Organization* (2012) 203 Cal.App.4th 450, 463-464 (*Hecimovich*).)

"A plaintiff establishes a probability of prevailing on the claim by showing that the complaint is legally sufficient and supported by a prima facie showing of facts that, if proved at trial, would support a judgment in the plaintiff's favor. [Citation.] The court cannot weigh the evidence, but must

determine as a matter of law whether the evidence is sufficient to support a judgment in the plaintiff's favor. [Citation.] The defendant can defeat the plaintiff's evidentiary showing, however, by presenting evidence that establishes as a matter of law that the plaintiff cannot prevail." (*Digerati Holdings, LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 884 (*Digerati Holdings*).)

As section 425.16, subdivision (a) mandates, the anti-SLAPP statute "shall be construed broadly." However, "[o]nly a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) As to the second step, "[a]s the Supreme Court early-on noted, the anti-SLAPP statute operates like a 'motion for summary judgment in "reverse." ' [Citation.] Or, as that court would later put it, 'Section 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary judgment-like procedure at an early stage of the litigation. [Citation.]' " (*Grewal v. Jammu* (2011) 191 Cal.App.4th 977, 990.)

We review a trial court's ruling granting or denying an anti-SLAPP motion de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.) Like the trial court, "[w]e consider 'the pleadings, and supporting and opposing affidavits upon which the liability or defense is based.' [Citation.] However, we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.' " (*Ibid.*)

II.

Michael's Claims Against Millar and Sabin Arise from Protected Activity.

In support of their anti-SLAPP motion, the cross-defendants, including Millar and Sabin, submitted the declaration of their counsel attaching and authenticating various documents, including the settlement agreement, complaint, cross-complaint, various declarations and other documents filed in this action, excerpts of depositions, public records regarding various permits and correspondence between the parties. They argued these documents establish that the conduct that was the basis of Michael's claims against them were protected activity under section 425.16, subdivision (e). Specifically, they argued the claims in the cross-complaint were based on "the Unobskeys' exercise of protected rights, such as (a) the Unobskeys' right to contest some of Michael's building permits, (b) the Unobskeys' right to object to the variance sought by Michael, and (c) the Unobskeys' right to seek opposition to Michael's project from the neighborhood." We have reviewed all of these documents, as well as additional documents proffered by Michael. Based on the cross-complaint and the documents, and for reasons we shall explain, we agree with Millar and Sabin.

"A defendant satisfies the first step of the analysis by demonstrating that the 'conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e) [of section 425.16]' [citation], and that the plaintiff's claims in fact *arise* from that conduct." (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 620 (*Rand Resources, LLC*).) "The four categories in subdivision (e) describe conduct 'in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue.' " (*Ibid.*) Millar and Sabin have invoked all four subdivisions of section 425.16,

subdivision (e). However, we need only address one to conclude that their allegedly actionable conduct was protected activity as defined by that section. As already noted, section 425.16, subdivision (e)(2) protects "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law." (§ 425.16, subd. (e)(2).) In order for a communication to be "in connection 'with *an issue* under consideration or review' " for purposes of subdivision (e)(2), Millar and Sabin must show " 'a connection with an issue under review in that proceeding.' " (*Rand Resources, LLC*, at p. 620.) Both the complaint and the evidentiary record demonstrate such a connection.

Michael's cross-complaint is squarely aimed at the Unobskeys' acts and statements relating to the dispute between them concerning Michael's major renovation project. More particularly, it is aimed at what it describes as the Unobskeys' efforts, through objections and appeals made in complaints to local officials and in administrative proceedings concerning permits and variances, to thwart and/or delay Michael's project, allegedly as leverage to force him to agree with their own expansion plans or to force him to pay for an expensive micro-pile solution to fix problems in their foundation that he did not cause and that had been a long time in the making.

Local land use proceedings before government officials and tribunals, however initiated, plainly involve an exercise of the right to petition the government, both by the party seeking a permit or variance and by the party objecting to it (see, e.g., *Golden Eagle Land Investment, L.P. v. Rancho Santa Fe Assn.* (2018) 19 Cal.App.5th 399, 418, 420-421 [homeowner association's letter to county authorities opposing developer's proposed project]; *Levy v. City of Santa Monica* (2004) 114 Cal.App.4th 1252, 1258-1259 [homeowner's

act of contacting city official and council member's contact with city's planning staff]; *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1172, 1176 [conversations by opponent of project with her employer to dissuade it from supporting project to place women's shelter in neighborhood]), and constitute official proceedings within the meaning of section 425.16, subdivision (e)(2). (See *Young v. County of Marin* (1987) 195 Cal.App.3d 863, 872-873 (1987) ["proceedings . . . within and before county boards of supervisors"]; *Frisk v. Merrihew* (1974) 42 Cal.App.3d 319, 323-324 [school board meeting]; see also *Olaes v. Nationwide Mutual Ins. Co.* (2006) 135 Cal.App.4th 1501, 1507 ["governmental forum, regardless of label"].) [7]

The cross-complaint alleges Millar and Sabin made statements and engaged in acts that directly relate to issues the Unobskeys raised to government officials and in government proceedings—most significantly, whether Michael's excavation work caused and would continue to cause settlement damage to the Unobskeys' property. According to the cross-complaint, both Millar and Sabin attributed settlement of the Unobskey property to Michael's excavation work, when in fact that settlement had been ongoing for decades and resulted from defects in the Unobskeys' foundation and problematic soil conditions. Millar also allegedly withheld information from other consultants relating to this issue so they would prepare reports blaming settlement damage on Michael's construction.

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[7] *Young* and *Frisk* addressed "official proceedings" in the context of the litigation privilege. The same phrase is used in section 425.16, subdivision (e)(1) and (2) of the anti-SLAPP statute and courts have considered the latter as " 'coextensive with the litigation privilege of Civil Code section 47, subdivision (b).' " (*AF Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1125.)

The cross-complaint itself ties Millar's and Sabin's statements to official proceedings. It alleges, "The false reports [allegedly issued because Millar withheld information about settlement on the Unobskeys' property] would then be used *to support Sidney and Nancy's appeals of Michael's permits*." (Italics added.) As the cross-complaint further alleges, the subject of settlement damage allegedly caused by his construction was raised by the Unobskeys in the variance appeal in the Board of Appeals and addressed in the partial settlement agreement they and Michael entered resolving that appeal. Asserting causes of action for "fraud" and conspiracy to defraud against Millar and Sabin based on their allegedly false statements, the cross-complaint alleges they made those statements "*to induce . . . the Planning Department to act in reliance on those representations*" and that their "deceitful and fraudulent" behaviors "*cost Michael approximately $350,000 in consultant fees* as Michael were [*sic*] forced *to rebut the fraudulent claims*." (Italics added.)

Documents in the record further demonstrate the connection between Millar's and Sabin's allegedly fraudulent acts and statements and the official proceedings. The documents show the alleged existing and potential future settlement damage to the Unobskeys' property from Michael's excavation work and the legal status of the balconies on Michael's property (about which Millar made other allegedly false statements) were raised repeatedly before city officials and entities, such as the DBI, the Zoning Administrator, the Planning Commission and the Board of Appeals, on dates in 2013 and 2014 in the case of the balconies and 2015 and 2016 in the case of the alleged settlement damage to the Unobskeys' foundation. Millar spoke about the balcony issue on the Unobskeys' behalf at a hearing before the Planning Department. In a brief he filed in the trial court in this case, Michael accused

Millar of having "withheld crucial documents and information from [another consultant] in order to get the *findings* that he and Sidney desired" and of using that consultant's report *"in challenging the Michaels' site permit*, which resulted in serious delays to the Michaels' construction project." (Italics added.)

The record also supports a connection between Michael's claims against Millar and Sabin and this litigation. The issue of alleged settlement damage to the Unobskeys' property is central to this case, consuming considerable space in both Unobskey's complaint and Michael's cross-complaint. The cross-complaint alleges the cross-defendants' conspiracy to fraudulently claim his excavation work caused settlement damage to the Unobskeys' property was "continuing to the present" and causing additional damages.

Even more compellingly establishing the links between the alleged conduct of Millar and Sabin, on the one hand, and these judicial proceedings, on the other, are documents Michael filed earlier in this litigation. A declaration by his counsel in support of his motion for discovery sanctions states certain communications by the Unobskeys' consultants in 2014 show Sidney, "was . . . contemplating the possibility of litigation as early as January 2013, and certainly by mid-2014." A reply brief Michael filed in support of his motion to file the cross-complaint similarly states Millar and Sabin "both were *instrumental* in the extortion and coercion tactics of the Unobskeys" and "in concert" with the latter "forced" Michael "to incur over $7m in damages because of delays to his construction, *additional consultant costs* and additional construction costs." (Italics added.) It alleges Millar and Sabin "were willing to go to extreme measures to protect the Unobskeys, as well as conspire with them *to further bogus claims against the Michaels*." (Italics added.) A chronology Michael submitted to the DBI in 2016

acknowledges that in 2015 *he* "prepare[d] a draft complaint, alleging that Unobskey is trying to extort Michael by fraudulently claiming Michael caused foundation damage which Unobskey knows to be a pre-existing condition."

In short, the cross-complaint along with other documents in the record demonstrate that the alleged misstatements and conduct of Millar and Sabin were made in support of the Unobskeys' petitioning activity, specifically, in connection with both official proceedings and potential litigation.

Michael makes various arguments contending Millar's and Sabin's statements are not protected activity. He argues that Millar is not being sued for his communications as a witness; rather, "[h]e is being sued because of his misrepresentations to Michael and his team in 2013 and 2014." He further contends Millar is wrong in claiming his communications are protected activity "regardless of who the communication was directed to, where (and when) the statement was made, or the topic. . . . Just because Millar had 'communications with the opposing party [i.e. Michael and his team],' it does not make the communications protected without knowing the context of the communications with Michael." Similarly, he contends Millar's communications about the "new distress" to the Unobskeys' home resulting from Michael's construction do not "fall within Subsections (e)(1), (e)(2) and (e)(3) because the communications were in 2014 at the Unobskeys' home" and made to another consultant "via a private letter."

Even if we accepted Michael's assertion that he is not relying on statements made by these cross-defendants during their depositions or on their status as potential witnesses, this does not preclude a determination that the statements were made in connection with official or judicial proceedings. Nor are his assertions that the statements were made to other

consultants, at the Unobskeys' home, or in a letter to another consultant, dispositive of whether they were "in connection with" the official proceedings or this litigation.

Statements made to third parties who are not parties to official proceedings or litigation may fall within section 425.16, subdivision (e)(2). (See *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1270 [letter addressed to customers of party]; *Contemporary Services Corp. v. Staff Pro Inc.* (2007) 152 Cal.App.4th 1043, 1055 [e-mail to customers accusing competitor of litigation-related misconduct]; *Healy v. Tuscany Hills Landscape & Recreation Corp.* (2006) 137 Cal.App.4th 1, 5-6 [letter from homeowners association to nonparty association members]; *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 784 (*Dove Audio*) [letter to artist participants in charitable recording].) Moreover, statements need not be made "in" a public proceeding to fall within section 425.16, subdivision (e)(2). Such a narrow interpretation would render section 425.16, subdivision (e)(1)—which covers statements made "*before* a legislative, executive, or judicial proceeding, or any other official proceeding"—meaningless.

The "in connection with" language of section 425.16, subdivision (e)(2) generally has been broadly construed. Thus, acts in anticipation of official proceedings or litigation and preparatory to either are covered by section 425.16, subsection (e)(2). In *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106 (*Briggs*), our high court so held, ruling that a nonprofit entity's statements and acts while counseling and assisting tenants to file HUD complaints and judicial proceedings fell within section 425.16, subdivision (e)(2). (*Briggs*, at pp. 1109-1110, 1115.) Landlords' defamation and interference with contract claims against the non-

profit were " 'communications preparatory to or in anticipation of the bringing of an action or other official proceeding,' " which the court held are "entitled to the benefits of section 425.16.' " (*Id.* at p. 1115.) The court specifically rejected the argument that "section 425.16 does not apply to events that transpire between private individuals" and "protects only statements or writings that defend the speaker's or writer's own . . . petition." (*Id.* at p. 1116; see also *ibid.* ["the statute does not require that a defendant moving to strike under section 425.16 demonstrate that its protected statements or writings were made *on its own behalf* (rather than, for example, on behalf of its clients or the general public)"].)

Briggs cited *Dove Audio, supra*, 47 Cal.App.4th 777, in which the Second District held a libel and interference with business claim brought by Dove Audio against a law firm fell within the anti-SLAPP statute. The firm, at the request of a client (the estate of Audrey Hepburn), wrote to other artists who had contributed to a recording for which Dove Audio agreed to pay a portion of the royalties to charities. (*Dove Audio,* at p. 780.) The letter requested support for a complaint the law firm planned to submit to the attorney general claiming Dove Audio had failed to pay the royalties. (*Ibid.*) Rejecting Dove Audio's argument that its defamation suit against the law firm did not fall within section 425.16, subdivision (e)(1) and (e)(2), the court held "[t]he communication was made in connection with an official proceeding authorized by law a proposed complaint to the Attorney General seeking an investigation." (*Dove Audio*, at p. 784.)

And in *Salma v. Capon* (2008) 161 Cal.App.4th 1275, our colleagues in Division Five of this District held a party's pre-litigation communications with municipal departments as part of efforts to investigate the circumstances of the improper sale of his home while he was incapacitated

were in anticipation of litigation and therefore protected by the anti-SLAPP statute. (*Salma*, at pp. 1286-1287.)

Under *Briggs* and *Dove Audio*, counseling potential litigants and seeking support for an investigation constituted protected activity as defined in section 425.16, subdivisions (e)(1) and/or (e)(2) even though the defendants were not parties to the proceedings and their statements were made before any proceedings were initiated. (See also *Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 940-945 [employer's suit against former employees claiming they interfered with contractual relations by encouraging current employees to quit and sue the employer fell within the anti-SLAPP statute]; *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 18 [instigating lawsuits by others was protected activity].) Under *Salma*, communications in the course of investigating facts relevant to potential litigation were likewise protected.

Here, Millar and Sabin, the Unobskeys' long time architect and their personal assistant, communicated with Michael and his consultants on behalf of the Unobskeys. The allegations indicate they lent moral support, and in Millar's case provided professional support, to the Unobskeys by advancing the theory to Michael and his consultants that his construction work had damaged the Unobskeys' home. When all of the statements were made, the Unobskeys engaged counsel, and when many were made, Michael also had counsel.[8] Both parties had employed consultants to investigate Michael's construction plans and work, and were participating in official proceedings

[8] The Unobskeys apparently have engaged a number of different attorneys over the course of these proceedings, the first having been engaged sometime in 2012. At the Planning Department hearing in July 2014, Michael was represented by counsel who indicated he had been involved since at least November 2013.

before the DBI, the Planning Department and the Board of Appeals. Millar and Sabin were addressing issues that were the subjects of some of those official proceedings and that, if not otherwise resolved, would likely become subjects of litigation.

Finally, Michael invokes the California Supreme Court decision in *Rand Resources, LLC,* to argue that "Millar's analysis fails to demonstrate that the statement or writing was actually made at, or before, a pending or immediately pending proceeding." *Rand Resources, LLC*, which among other things focused on the section 425.16, subdivision (e)(2) language "in connection with an issue under consideration or review," was decided in 2019, the year following the briefing and adjudication of the anti-SLAPP motion in the trial court. Our high court observed that section 425.16, subdivision (e)(2) "appears to contemplate an ongoing—or, at the very least, immediately pending—official proceeding." (*Rand Resources, LLC, supra*, 6 Cal.5th at p. 627.) The court cited appellate court decisions such as *Mission Beverage Co. v. Pabst Brewing Co., LLC* (2017) 15 Cal.App.5th 686, which held that "preparatory communications do not qualify as a protected activity if future litigation is not anticipated, and is therefore only a 'possibility,' " but that acts preceding litigation or official proceedings may qualify "if they are ' "communications preparatory to or in anticipation of the bringing of an action or other official proceeding." ' " (*Id.* at p. 703, cited in *Rand Resources, LLC* at p. 627.) And *Rand Resources, LLC* did not question or overrule *Briggs*, which held that even a nonparty's acts preceding and relating to anticipated litigation fall within section 425.16, subdivision (e)(2).

Here, as we have already laid out, the cross-complaint alleges Millar and Sabin (along with the Unobskeys) made false statements about prior settlement of the Unobskeys' property and the adverse effects of Michael's

work on that property *on an ongoing basis* from 2013 until 2016 and beyond. In November 2013, Millar allegedly told Michael's consultant that Michael's balconies had not been built with permits. As we have already noted, the fraud claim specifically alleges the cross-defendants made these statements *to induce the Planning Department*, to act in reliance on them. There can be no doubt that official proceedings addressing these issues, even if they did not occur for some time after the statements were *first* made, obviously were anticipated by all parties—since their intent in making them, according to the cross-complaint itself, was to induce the Planning Department to act in reliance on them. The same is true about this litigation, which Michael has asserted Sidney "was . . . contemplating . . . as early as January 2013, and certainly by mid-2014." This case is thus unlike *Rand Resources, LLC*, in which the court held a city attorney's statement about renewal of an exclusive agency agreement between the city and plaintiff was not made "in connection with an issue under consideration or review" because it was made two years before the renewal proceedings before the City Council (*Rand Resources, LLC*, *supra*, 6 Cal.5th at p. 627); indeed, the statement was made even before the plaintiff had entered into the agreement. (*Id.* at p. 617.) There was no indication that anyone anticipated there would be any dispute or controversy about renewal of the agreement at the time the alleged statements were made. (*Id.* at p. 627.)

We conclude that Millar and Sabin have made the required prima facie showing that the statements and conduct on which Michael's cross-claims against them are based were made in anticipation of and preparation for official proceedings and litigation and fall within section 425.16, subsection (e)(2) of the anti-SLAPP statute.

III.

Michael Has Not Shown His Claims Against Millar and Sabin Have Even Minimal Merit.[9]

Having determined Millar and Sabin met their threshold burden to show their alleged statements and conduct constitute protected activity, we now turn to the second step of the anti-SLAPP analysis, to determine whether Michael, as cross-complainant, has demonstrated a probability of prevailing on his claims. (See *Hecimovich*, *supra*, 203 Cal.App.4th at p. 468 [appellate court can decide step 2 issue of anti-SLAPP analysis even where trial court did not reach it].)

As our high court has stated, "[t]o satisfy the second prong, 'a plaintiff responding to an anti-SLAPP motion must " 'state[] and substantiate[] a legally sufficient claim.' " [Citations.] Put another way, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." ' [Citation.] . . . 'However, we neither "weigh credibility, [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that

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[9] Michael argues that a motion seeking to strike an entire complaint, as cross-defendants' motion did in the trial court, may be denied "if plaintiff shows a probability of prevailing on any part of its claim." He relies for that broad proposition on *Baral v. Schnitt* (2016) 1 Cal.5th 376, which does not support it. *Baral* addressed what showing is required in the second step of the analysis by a plaintiff who has based a cause of action on both protected and unprotected activity. (*Id*. at p. 385.) The court held the plaintiff must demonstrate that each claim based on protected activity is "legally sufficient and factually substantiated." (*Id*. at p. 396.) In any event, because, as we will shortly discuss, Michael has not shown a likelihood of prevailing on any part of his fraud or conspiracy to defraud claims against Millar and Sabin, we need not address this argument further.

submitted by the plaintiff as a matter of law." ' " (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.)

"While plaintiff's burden may not be 'high,' he must demonstrate that his claim is legally sufficient. [Citation.] And he must show that it is supported by a sufficient prima facie showing, one made with 'competent and admissible evidence.' " (*Hecimovich*, *supra*, 203 Cal.App.4th at p. 469.) As we said in *Hecimovich*, so here: Michael's "demonstration does not measure up." (*Ibid.*)

Millar and Sabin argue in their opening brief that Michael's claims are barred by the litigation privilege and in their reply brief that Michael failed to establish the prima facie elements of his claims for fraud and conspiracy. Michael argues that he met his burden of showing he is "likely to prevail on his fraud and conspiracy claims against Millar and Sabin"; and that Millar's and Sabin's defenses, including the litigation privilege defense, lack merit.

A. Michael Failed to Show His Claims Against Millar and Sabin Are Legally Tenable.

Michael does not contend that Millar and Sabin waived any argument that he failed to show he is likely to prevail on the cross-complaint's causes of action against them for fraud or conspiracy against them. Instead, he argues at some length that he did make such a showing. Because Michael does not assert forfeiture and has taken the opportunity to address the sufficiency of his claims, we will address Michael's failure to state a legally viable claim for relief.

As we have already noted, Michael includes these cross-defendants in two of his causes of action against the Unobskeys, one for fraud and the other for conspiracy to defraud. As to Millar and Sabin, he alleges that they and the Unobskeys "continuously stated" that the Unobskeys' house "has no foundation issues and . . . had not experienced any settlement prior to

Michael's hand-dug pier work" until "chang[ing] [their] story" in 2016 to say no prior settlement had occurred for "many decades until Michael started his work," and that Millar informed someone named "Robert Passmore" that "Michael's balconies were illegal because he could not find a permit showing the balconies." According to the cross-complaint, these allegations are "false" because the Unobskeys, Millar and Sabin "have been concerned for some time regarding his [*sic*] defective foundation and has [*sic*] been aware for some time that his [*sic*] house has settled more than 5 inches," the Unobskeys' house "has been settling for years and any work done by Michael at most only contributed minor settlement," and "[t]he true cause of settlement is [the Unobskeys'] foundation, which inadequately deals with the underground streams beneath his property," "[t]here was a legal permit on file for one of the balconies, and strong evidence that in fact both balconies were legally permitted," and "Michael's balconies were, in fact, legal and had existed for a significantly long time." The cross-complaint alleges the cross-defendants made these statements "knowing them to be false" and "with the intention to induce Michael and the Planning Department to act in reliance on [them]."

Notably absent from the fraud cause of action is any allegation that either Michael or the Planning Department actually relied on these alleged misrepresentations, much less what acts they took in reliance. This alone is fatal to the cause of action. Reliance is an essential element of a fraud claim, and like all other elements, must be pled with particularity. (See *Hecimovich*, *supra*, 203 Cal.App.4th at p. 476 [plaintiff failed to show likelihood of prevailing where allegations refuted element of reliance]; 5 Witkin, Summary of Cal. Law (11th ed. 2017) Torts, § 928, p. 1261 [plaintiff must have actually relied on misrepresentation]; 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 730, p. 148 ["The plaintiff must plead that he or she

believed the representation to be true . . . , and that in reliance on this belief (or induced by it), he or she entered into the transaction"].) Further, Michael did not allege, and mostly likely could not allege, that any such reliance was justifiable. (See *B.L.M. v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 836-837, 840-841 (*B.L.M.*) [complaint failed to state claim for negligent misrepresentation where it failed to allege facts showing plaintiff's reliance on counsel for party on other side of transaction was justifiable].)

In *B.L.M.*, it was clear from the complaint that the defendant law firm had been hired by the city that was negotiating with the plaintiff, B.L.M. (*B.L.M.*, *supra*, 55 Cal.App.4th at p. 836.) The allegations indicated "that B.L.M. was represented by its own counsel, [which] had at least at one point given a legal opinion directly contrary to [the defendant law firm] on which B.L.M. subsequently relied." (*Ibid.*) "The complaint include[d] no other allegations to explain or justify B.L.M.'s reliance on the opinion of the law firm representing the parties with whom B.L.M. was in negotiations regarding development of the project." (*Ibid.*)

Just as B.L.M.'s reliance on the opinion of the lawyer representing his adversary was not justifiable, here, similarly, any reliance by Michael on the Unobskeys' consultant, Millar, and even on their assistant, Sabin, were likewise unjustifiable. This is especially so because, as the cross-complaint alleged, Michael retained his own consultants, Millar at one point admitted there had been prior settlement of the Unobskeys' property, and Michael commissioned a photo survey of the Unobskeys' home prior to commencing work on his project that showed pre-existing settlement damage to the Unobskeys' property. Indeed, the cross-complaint goes so far as to allege that Unobskey's attempt "to blame his foundation issues on Michael's construction" was "patently absurd," given the damage shown in the photo

survey. These allegations show that Michael did not rely on Millar's and Sabin's statements and that even if they had, such reliance would not have been justifiable.

The damages Michael alleges he sustained also undercut any notion that he actually relied on Millar's and Sabin's statements. The expert costs he incurred to "rebut the fraudulent claims" were not the product of any misconception he harbored based on Millar's or Sabin's statements. Rather, those damages are the product of his *dis*belief in those statements and corresponding effort to *dis*prove them. (See *Buckland v. Threshold Enterprises, Ltd.* (2007) 155 Cal.App.4th 798, 808, disapproved in part on other grounds by *Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 337 [" 'In order to justify recovery, the recipient of a misrepresentation must rely upon the truth of the misrepresentation itself, and his reliance upon its truth must be a substantial factor in inducing him to act or to refrain from action' "].)[10]

Finally and relatedly, another element of a claim for fraud is that the plaintiff incur damages as a result of the fraud. (See *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1062 [the two causation elements in a fraud cause of action are that "the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action" and "the detrimental action taken by the plaintiff must have

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[10] Nor does Michael's allegation that cross-defendants intended to induce reliance on the part of the Planning Department aid his attempt to state a claim for fraud. " 'In establishing a cause of action for deceit or fraud, a plaintiff must [allege] that a material and knowingly false representation was made with the intent to induce action, *and that such representation caused reasonable and detrimental reliance on the part of the plaintiff*.' " (*Pulver v. Avco Financial Servs.* (1986) 182 Cal.App.3d 622, 640, italics added.)

caused his alleged damage"].) The only damages Michael alleges with particularity that he suffered from the alleged fraud are "approximately $350,000 in consultant fees as Michael were [*sic*] forced to rebut the fraudulent claims" and $600,000 because Michael and his family were delayed in "being able to use their home [and incurred] increased . . . costs and carrying costs of construction" and "rent as they were unable to occupy their home in a timely fashion." These are not damages resulting from *fraud*, i.e., from any detrimental acts Michael took in reliance on cross-defendants' statements. Rather, they are the costs Michael claims he incurred to investigate and disprove their assertions in the local government and judicial proceedings. (Cf. *Cooper v. Equity Gen. Ins.* (1990) 219 Cal.App.3d 1252, 1253 [insurer's allegation that misrepresentations by insureds caused it to incur costs of seeking coverage opinions and attempting to commence investigation failed to allege damage element of fraud].)

Looking beyond the cross-complaint, the evidence Michael submitted in opposition to the anti-SLAPP motion similarly fails to support his fraud claim. If anything, it refutes his claim. Michael's declaration in opposition to the motion recounts that before Michael began construction, Millar told him the Unobskeys' property "had experienced over 5 [inches] of settlement over the past two decades and that there was a stream running under the home." Further, he explains that his own consultants performed a photo survey of the Unobskeys' home before construction that showed the Unobskeys' home had already experienced "significant settlement damage." According to the declaration, Michael's "team" used that survey to point out to Millar "that all of the 'new distress' existed prior to us starting construction." Nowhere in the declaration does Michael state that he ever relied on Millar's allegedly false statements about his project causing settlement of the Unobskeys'

property, much less how, in view of Millar's earlier statement to him about prior settlement and Michael's apparent reliance on his own experts, any such reliance on Millar's allegedly false later statements could have been justifiable.

The conspiracy to defraud claim suffers from the same deficiency as the fraud claim. (See 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 923, pp. 337-338 [to allege conspiracy plaintiff must sufficiently allege elements of underlying wrong].) Civil conspiracy is not an independent tort separate from the underlying tort itself. (*Stueve Bros. Farms, LLC v. Berger Kahn* (2013) 222 Cal.App.4th 303, 323.) Michael's allegations that Millar and Sabin falsely represented that his construction caused settlement of Unobskey's property as part of a "conspiracy" they entered with the Unobskeys fails to supply the missing element of reliance needed for a claim of fraud or any damages incurred because of that reliance.

For these reasons, Michael has failed to meet his burden under the second step of the anti-SLAPP analysis to show his claims have even minimal merit.

B. Michael's Claims Against Millar and Sabin Are Likely Barred by the Litigation Privilege.[11]

Even if Michael had met his burden to make a prima facie showing that his claims had merit, his claims would fail for a different reason. Millar and

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[11] Michael assumes that the cross-defendants have the burden of proof to show the privilege applies even though in the context of an anti-SLAPP motion the plaintiff (or here cross-complainant) ordinarily bears the burden on the second step to show his claims have probable validity. As our Second District colleagues recently observed in *Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 683: "Some cases state that 'although section 425.16 places on the plaintiff the burden of substantiating its claims, a defendant that advances an affirmative defense to such claims properly bears the burden of proof on the defense. [Citation.]' [Citation.] Others suggest that

Sabin argue Michael cannot establish a probability of prevailing on his claims against them because the claims are barred by the litigation privilege under Civil Code section 47, subdivision (b). That section provides: "A privileged publication or broadcast is one made: [¶] . . . [¶] In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law . . . "

"As usually formulated, 'the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.' " (*Mattco Forge, Inc. v. Arthur Young & Co.* (1992) 5 Cal.App.4th 392, 402-403.) "The statutory privilege protects attorneys, judges, jurors, witnesses, and other court personnel from liability arising from publications made during a judicial proceeding. [Citation.] Although originally enacted in the context of defamation actions, the privilege now applies to 'any communication, whether or not it amounts to a publication [citations], and all torts except malicious prosecution. [Citations.] Further, it applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved.' " (*Id.* at p. 402.)

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the litigation privilege presents ' "a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing." ' " What our colleagues further said in *Dickinson* is true here as well: "Given the evidence in this case, we need not resolve the dispute here. What is important is that, regardless of the burden of proof, the court must determine whether plaintiff can establish a prima facie case of prevailing, or whether defendant has defeated plaintiff's evidence as a matter of law." (*Ibid.*)

"The privilege 'is not limited to statements made during a trial or other proceedings, but may extend to steps taken prior thereto, or afterwards.' " (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241 (*Action Apartment Assn.*).) " 'The principal purpose of [the litigation privilege] is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. [Citations.]' [Citation.] In order to achieve this purpose of curtailing derivative lawsuits, we have given the litigation privilege a broad interpretation." (*Ibid.*)

Millar and Sabin contend that the claims against them "are protected by the litigation privilege because they involve communications relating to this litigation or to the Unobskeys' objections to Michael's permits and variances with the City." They rely on *Briggs*, *supra*, 19 Cal.4th at page 1115; *Bel Air Internet, LLC v. Morales*, *supra*, 20 Cal.App.5th at page 940; and *MMM Holdings, Inc. v. Reich* (2018) 21 Cal.App.5th 167, 183 for the propositions that the privilege is "not limited to post-filing conduct," that it covers "pre-litigation activities" and that it " ' " may extend to steps taken prior [to], or after[]" ' " " ' "a trial or other proceedings." ' "

Michael responds by claiming Millar and Sabin have "failed to show that the alleged publications were related to litigation, that it was [*sic*] made in good faith, the contemplated litigation was imminent and the litigation was to resolve the dispute." Michael neither cites nor discusses any case law discussing the privilege or supporting any of these arguments, which are entirely conclusory.

Some of the allegations and evidence we have discussed in the first step of our anti-SLAPP analysis are likewise pertinent to whether the statements Michael attributes to Millar and Sabin are privileged under Civil Code

section 47, subdivision (b).[12] Again, Michael's declaration stated that Sidney "was . . . contemplating the possibility of litigation as early as January 2013, and certainly by mid-2014," and the statements on which Michael's fraud and conspiracy to defraud claims are based were made around and after these dates—in some instances up to the date the cross-complaint was filed. Moreover, like the anti-SLAPP law, the litigation privilege extends to official proceedings (Civ. Code, § 47, subd. (b)), which were happening in the same time period, and the cross-complaint alleges Millar and Sabin made these statements for the purpose of influencing the Planning Department and caused him to incur the cost of consultants in order "to rebut the fraudulent claims."

Michael's assertions in a trial court brief that Millar and Sabin "were instrumental in the extortion and coercion tactics of the Unobskeys" and "were willing to go to extreme measures to protect the Unobskeys, as well as, conspire with them to further bogus claims against the Michaels" only underscores the connection between their alleged statements and the then-ongoing administrative proceedings and the then-anticipated judicial proceedings. In short, Michael's own words demonstrate the connection

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[12] We are aware that "[t]he scope of the protections afforded to litigation-related communications under the anti-SLAPP statute and that afforded by the litigation privilege (Civ.Code, § 47) are not identical." (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1479.) However, as this court observed in *Feldman*, "the California Supreme Court has repeatedly recognized the relationship between the two," and it and the Court of Appeal " 'have looked to the litigation privilege as an aid in construing the scope of section 425.16, subdivision (e)(1) and (2) with respect to the first step of the two-step anti-SLAPP inquiry—that is, by examining the scope of the litigation privilege to determine whether a given communication falls within the ambit of subdivision (e)(1) and (2).' " (*Ibid.*)

between the allegedly fraudulent statements and both litigation and official proceedings.

Further, as we have also discussed in connection with our anti-SLAPP analysis, the statements that are the basis for Michael's claims against these cross-defendants about whether his construction damaged the Unobskeys' property go to the heart of the dispute in this litigation and were relevant, at least to some degree, in the local government proceedings and the partial settlement of one of those proceedings. They were thus statements made " 'in furtherance of the objects of the litigation' " and the official proceedings. (*Action Apartment Assn., supra*, 41 Cal.4th at p. 1251.)

Michael argues that plaintiffs failed to show that the statements were made or that the litigation was filed—the brief is unclear which—"in good faith." To the extent he means the *statements* were not made in good faith, he misconstrues that prerequisite for applying the privilege to prelitigation statements. "A prelitigation communication is privileged only when it relates to *litigation that is contemplated in good faith* and under serious consideration." (*Action Apartment Assn., supra,* 41 Cal.4th at p. 1251, italics added.) This means only that litigation must actually be contemplated and not that the litigation must be meritorious. (*Ibid*. [publications made without good faith belief in their truth, "when made in good faith anticipation of litigation, are protected as part of the price paid for affording litigants the utmost freedom of access to the courts"].) If he means that litigation was not contemplated in good faith, we reject the argument. As we have already discussed, Michael himself has acknowledged that Unobskey was contemplating litigation during the period Millar and Sabin allegedly made the supposedly false and fraudulent statements, and those statements directly relate to the dispute that is the subject of the litigation. Further,

Michael drafted a complaint in August 2015 and the Unobskeys filed this litigation in September 2015, which is evidence of good faith contemplation of litigation. It is also undisputed that Michael and the Unobskeys participated in official proceedings from 2013 through 2015. This is evidence of good faith contemplation of both. (See *Digerati Holdings, supra,* 194 Cal.App.4th at p. 888 [fact that defendants commenced litigation soon after alleged statements were made was evidence they seriously contemplated litigation].)

In short, we also conclude that the pleadings and the evidence show Michael's claims against Millar and Sabin are likely barred by the litigation privilege, thus further undercutting Michael's argument that he has shown a likelihood he will prevail on his claims against Millar and Sabin within the meaning of the anti-SLAPP statute.

DISPOSITION

Applying de novo review, we conclude Millar and Sabin have shown the claims against them are based on protected activity and Michael has failed to show a likelihood of success on those claims. We therefore reverse the trial court's order denying the anti-SLAPP motion as to Millar and Sabin and direct the trial court (1) to enter a new and different order granting the motion to strike, and (2) hold a hearing, following further briefing, to award Millar and Sabin the attorney fees to which they are entitled under section 425.16. Appellants Millar and Sabin are awarded their costs on appeal.

STEWART, J.

We concur.

KLINE, P.J.

MILLER, J.

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